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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Margaret Mary Smith,
9

10 Plaintiff,

11 v.

12 Michael J. Astrue, Commissioner of Social
13 Security Administration,

14 Defendant.

No. CV11-1242-PHX-JAT

ORDER

15 Plaintiff Margaret Mary Smith appeals the Commissioner of Social Security's (the
16 "Commissioner") denial of disability benefits. The Court now rules on her appeal (Doc.
17 17.)

18 **I. BACKGROUND**

19 **A. Procedural Background**

20 In October 2007, Plaintiff filed applications for benefits under Titles II and XVI of
21 the Social Security Act. She claimed that she became disabled on November 2, 2006,
22 due to: fibromyalgia, chronic fatigue, diabetes, chronic low back pain, valley fever, and
23 hyperthyroidism. Plaintiff's applications were denied initially and on reconsideration.
24 Plaintiff testified at a hearing before Administrative Law Judge Joan G. Knight (the
25 "ALJ") on January 20, 2010. The ALJ issued an unfavorable decision on April 27, 2010.
26 The Appeals Council denied Plaintiff's request for review, making the ALJ's decision the
27 final decision of the Commissioner. Plaintiff filed this appeal pursuant to 42 U.S.C.
28 §405(b) on June 24, 2011.

1 **B. Vocational Background**

2 Plaintiff was born in 1953 and was 53 years old on her alleged onset of disability
3 date and 56 years old at the time of the ALJ's decision denying benefits. Plaintiff has a
4 high school equivalent education. She worked in the past as a casino shift manager,
5 casino supervisor, and keno writer.

6 **C. Medical Background**

7 In November 2007, Tutankhamen Pappoe, M.D., examined Plaintiff based on her
8 complaints of neck and lower back pain. Plaintiff had some tenderness to palpation in
9 her neck and lower back, but she had normal motor strength, sensation, and reflexes; full
10 range of motion of the cervical and lumbar spine; and a negative straight-leg raising test
11 bilaterally. Dr. Pappoe diagnosed Plaintiff with cervical facet syndrome, lumbar facet
12 syndrome, and lumbar radiculopathy.

13 A November 2007 MRI of Plaintiff's cervical spine revealed mid-cervical
14 straightening, a small disc protrusion at C6-C7 with mild to moderate central canal
15 stenosis, and a small disc protrusion at C5-6 and C7-T1. A lumbar spine MRI at that
16 time revealed a mild bulge at L4-5 with a very small disc protrusion, mild right L4-L5
17 neural foraminal narrowing, and a minor annular bulge at L3-L4. A thoracic spine MRI
18 revealed a very small protrusion at T4-5, with no central canal stenosis or exiting nerve
19 root compression.

20 In March 2008, Thomas Glodek, M.D., a state agency physician, reviewed the
21 medical record and completed a physical residual functional capacity assessment. Dr.
22 Glodek determined that Plaintiff could perform a range of light work. He also found that
23 she had no manipulative, visual, or communicative limitations, but that she was
24 precluded from concentrated exposure to work hazards.

25 Spinal surgeon Edward Song, M.D., evaluated Plaintiff in March 2008, when she
26 complained of cervical, lumbar, thoracic, and bilateral sciatic pain. On examination,
27 Plaintiff had mild spinal tenderness and slightly limited range of motion of the lumbar
28 spine. She had no neurological deficits, except decreased sensation in the left humeral

1 area in the upper extremity, left medial thigh, lateral calf, and right foot. Plaintiff had
2 normal range of motion in the upper and lower extremities, including the shoulders,
3 elbows, hips, and knees, as well as normal range of motion in the cervical and thoracic
4 spine. Her motor strength was normal in the upper and lower extremities and her
5 straight-leg raising was negative bilaterally. Dr. Song diagnosed Plaintiff with
6 degeneration of a lumbar or lumbosacral intervertebral disc. He did not believe that she
7 was a candidate for spine surgery and recommended medical pain management for
8 possible fibromyalgia or other systemic disorder. Dr. Song found that Plaintiff could lift
9 as tolerated and had no other work-related limitations.

10 In April 2008, treating physician Jeffrey Levine, M.D., completed an assessment
11 of Plaintiff's physical ability to do work-related activities, indicating that she could: lift
12 and carry less than 10 pounds; stand and walk for less than 2 hours in an 8-hour workday;
13 sit for 2 hours in an 8-hour workday (and she needed to alternate between sitting and
14 standing every 30 minutes); never climb, stoop, crouch, or crawl; occasionally kneel;
15 continuously balance; never reach; and continuously handle, feel, and use hands for fine
16 manipulation; and that she had no environmental limitations. Dr. Levine also completed
17 a "pain functional capacity questionnaire," indicating Plaintiff had moderately severe
18 pain that frequently interfered with her attention and concentration and frequently caused
19 deficiencies of concentration, persistence, and pace.

20 James Huddleston, Ph.D., a psychologist, evaluated Plaintiff in October 2008 at
21 the request of the state agency. Dr. Huddleston diagnosed Plaintiff with major depressive
22 disorder, moderate, chronic, without psychotic features and anxiety disorder, not
23 otherwise specified (NOS), mild. He completed a medical source statement finding that
24 Plaintiff was mildly impaired in social interaction and in sustained concentration and
25 persistence, was capable of managing simple to moderately complex tasks on a sustained
26 basis, and was mildly impaired in her ability to respond adaptively to normal
27 environmental demands and stressors.

28 Jaine Foster-Valdez, Ph.D., a state agency psychologist, reviewed Plaintiff's

1 medical record in October 2008 and completed a Psychiatric Review Technique Form
2 (PRTF). Based on a review of the record, Dr. Valdez found that, under the “B” criteria of
3 the Listing of Impairments, Plaintiff had mild restriction of activities of daily living, mild
4 difficulties in maintaining social functioning, mild difficulties in maintaining
5 concentration, persistence, or pace, and no episodes of decompensation. Dr. Valdez
6 concluded that Plaintiff’s mental impairments were not severe.

7 Wayne Broky, M.D., examined Plaintiff in November 2008 at the request of the
8 state agency. During the examination, Plaintiff had discomfort to palpation over the
9 upper and lower spine and multiple tender points, but walked with a normal gait. She had
10 full range of motion in the shoulders, elbows, wrists, fingers, hips, knees, and ankles;
11 normal muscle strength and sensation in all extremities; and negative straight-leg raising
12 bilaterally. Dr. Broky diagnosed Plaintiff with symptoms characteristic of fibromyalgia
13 syndrome with a history of chronic fatigue syndrome; type 2 diabetes mellitus; history of
14 chronic lower back pain (history of bulging lumbar disks); history of valley fever;
15 hypothyroidism; and depression. He completed a physical assessment of Plaintiff’s
16 physical ability to do work-related activities, finding that Plaintiff: could occasionally lift
17 and carry 50 pounds and frequently lift and carry 10 pounds; could stand and/or walk 6
18 to 8 hours in an 8-hour workday; had no limitations in sitting; could never climb ropes or
19 scaffolds; could occasionally climb ladders, kneel, crouch, or crawl; could frequently
20 climb ramps or stairs, and stoop; had no limitations in reaching, handling, fingering, or
21 feeling; and had no environmental limitations, except for working around extremes in
22 temperature.

23 Martha Goodrich, M.D., a state agency physician, reviewed the medical record in
24 November 2008 and concurred with Dr. Glodek’s March 2008 opinion that Plaintiff
25 could perform light work.

26 **II. LEGAL STANDARD**

27 A district court:

28 may set aside a denial of disability benefits only if it is not

supported by substantial evidence or if it is based on legal error. Substantial evidence means more than a mere scintilla but less than a preponderance. Substantial evidence is relevant evidence, which considering the record as a whole, a reasonable person might accept as adequate to support a conclusion. Where the evidence is susceptible to more than one rational interpretation, one of which supports the ALJ's decision, the ALJ's decision must be upheld.

Thomas v. Barnhart, 278 F.3d 947, 954 (9th Cir. 2002) (internal citation and quotation omitted). This is because “[t]he trier of fact and not the reviewing court must resolve conflicts in the evidence, and if the evidence can support either outcome, the court may not substitute its judgment for that of the ALJ.” *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9th Cir. 1992). Also under this standard, the Court will uphold the ALJ's findings if supported by inferences reasonably drawn from the record. *Batson v. Comm’r of the Soc. Sec. Admin.*, 359 F.3d 1190, 1193 (9th Cir. 2004). However, the Court must consider the entire record as a whole and cannot affirm simply by isolating a “specific quantum of supporting evidence.” *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007)(internal quotation omitted).

III. DISCUSSION

To qualify for disability benefits under the Social Security Act a claimant must show, among other things, that she is “under a disability.” 42 U.S.C. §423(a)(1)(E). The Act defines “disability” as the “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.” 42 U.S.C. §423(d)(1)(A). A person is:

under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.

42 U.S.C. §423(d)(2)(A).

The Social Security regulations set forth a five-step sequential process for

1 evaluating disability claims. 20 C.F.R. §404.1520; *see also Reddick v. Chater*, 157 F.3d
2 715, 721 (9th Cir. 1998). A finding of “not disabled” at any step in the sequential process
3 will end the inquiry. 20 C.F.R. §404.1520(a)(4). The claimant bears the burden of proof
4 at the first four steps, but the burden shifts to the Commissioner at the final step.
5 *Reddick*, 157 F.3d at 721. The five steps are as follows:

6 1. First, the ALJ determines whether the claimant is “doing substantial gainful
7 activity.” 20 C.F.R. §404.1520(a)(4)(i). If so, the claimant is not disabled.

8 2. If the claimant is not gainfully employed, the ALJ next determines whether the
9 claimant has a “severe medically determinable physical or mental impairment.” 20
10 C.F.R. §404.1520(a)(4)(ii). To be considered severe, the impairment must “significantly
11 limit[] [the claimant's] physical or mental ability to do basic work activities.” 20 C.F.R.
12 §404.1520(c). Basic work activities are the “abilities and aptitudes to do most jobs,” for
13 example: lifting; carrying; reaching; understanding, carrying out and remembering simple
14 instructions; responding appropriately to co-workers; and dealing with changes in
15 routine. 20 C.F.R. §404.1521(b). Further, the impairment must either be expected “to
16 result in death” or “to last for a continuous period of twelve months.” 20 C.F.R.
17 §404.1509 (incorporated by reference in 20 C.F.R. §404.1520(a)(4)(ii)). The “step-two
18 inquiry is a de minimis screening device to dispose of groundless claims.” *Smolen v.*
19 *Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996). If the claimant does not have a severe
20 impairment, the claimant is not disabled.

21 3. Having found a severe impairment, the ALJ next determines whether the
22 impairment “meets or equals” one of the impairments listed in the regulations. 20 C.F.R.
23 §404.1520(a)(4)(iii). If so, the claimant is found disabled without further inquiry. If not,
24 before proceeding to the next step, the ALJ will make a finding regarding the claimant’s
25 “residual functional capacity based on all the relevant medical and other evidence in [the]
26 record.” 20 C.F.R. §404.1520(e). A claimant’s “residual functional capacity” (the
27 “RFC”) is the most she can do despite all her impairments, including those that are not
28 severe, and any related symptoms. 20 C.F.R. §404.1545(a)(1).

1 4. At step four, the ALJ determines whether, despite the impairments, the
2 claimant can still perform “past relevant work.” 20 C.F.R. §404.1520(a)(4)(iv). To make
3 this determination, the ALJ compares the “residual functional capacity assessment . . .
4 with the physical and mental demands of [the claimant’s] past relevant work.” 20 C.F.R.
5 §404.1520(f). If the claimant can still perform the kind of work she previously did, the
6 claimant is not disabled. Otherwise, the ALJ proceeds to the final step.

7 5. At the final step, the ALJ determines whether the claimant “can make an
8 adjustment to other work” that exists in the national economy. 20 C.F.R.
9 §404.1520(a)(4)(v). In making this determination, the ALJ considers the claimant’s
10 “residual functional capacity” and her “age, education, and work experience.” 20 C.F.R.
11 §404.1520(g)(1). If the claimant can perform other work, she is not disabled. If the
12 claimant cannot perform other work, she will be found disabled. As previously noted, the
13 Commissioner has the burden of proving the claimant can perform other work. *Reddick*,
14 157 F.3d at 721.

15 In this case, the ALJ concluded at step four of the sequential process that Plaintiff
16 was not disabled. The ALJ found that Plaintiff has the residual functional capacity to
17 perform light work as defined in 20 CFR 404.1567(b) and 416.967(b) — she can stand
18 and/or walk, with normal breaks, about 6 hours out of an 8-hour workday; sit, with
19 normal breaks, about 6 hours out of an 8-hour workday; has no limitations in pushing and
20 pulling other than the weight restrictions for lifting and carrying; can never climb ladders,
21 ropes, or scaffolds, but can occasionally climb ramps and stairs; and can frequently
22 balance, stoop, kneel, crouch, and crawl. The ALJ additionally found that Plaintiff needs
23 to avoid concentrated exposure to hazards such as unprotected heights and dangerous
24 moving machinery. The ALJ determined that Plaintiff was capable of performing her
25 past relevant work as a casino shift manager, casino supervisor, and Keno writer.

26 **A. Credibility Determination**

27 The ALJ did not accept Plaintiff’s complaints regarding her level of symptoms and
28 limitation during the relevant time. (Tr. 298.) If a claimant produces objective medical

1 evidence of an underlying impairment, as Plaintiff did here, then the ALJ cannot reject
2 the claimant's subjective complaints based solely on a lack of objective medical support
3 for the alleged severity of the pain. *Rollins v. Massanari*, 261 F.3d 853, 856 (9th Cir.
4 2001). If the ALJ finds the claimant's subjective testimony not credible, the ALJ must
5 make findings sufficiently specific to allow the reviewing court to conclude that the ALJ
6 rejected the testimony on permissible grounds and did not arbitrarily discredit the
7 claimant's testimony. *Id.* at 856-57. If no affirmative evidence of malingering exists,
8 then the ALJ must provide clear and convincing reasons for rejecting the claimant's
9 testimony about the severity of her symptoms. *Id.* at 857.

10 After reviewing the evidence, the ALJ found that Plaintiff's statements regarding
11 the intensity, persistence, and limiting effects of her symptoms were not credible to the
12 extent that they conflicted with the ALJ's residual functional capacity assessment. The
13 ALJ rejected Plaintiff's subjective testimony in part because the medical record showed
14 that many of Plaintiff's problems were resolved through surgical or other treatment and
15 because the medical record generally did not support Plaintiff's subjective reporting. The
16 ALJ also found that Plaintiff's statements regarding her activities of daily living — she
17 took care of pets, prepared simple meals, performed simple housework, used the
18 computer, handled monetary matters, drove, shopped in stores, and spent time with others
19 — were inconsistent with her allegations of debilitating limitations.

20 The ALJ further noted that Plaintiff made inconsistent statements regarding the
21 reasons she left her last employment. Plaintiff told Dr. Broky that she last worked at a
22 casino in 2005 and that she was fired for behavioral issues, but she told Dr. Huddleston
23 that she had issues with a supervisor and was terminated, then quit after filing a grievance
24 and winning.¹ And Plaintiff reported that she has applied for jobs without success during

25
26 ¹ A claimant's testimony that she left her last employment for reasons other than
27 her impairment provides a specific and cogent reason for rejecting the claimant's
28 subjective symptom testimony. *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir.
2001)("[T]he ALJ satisfied the *Bunnell* standard by providing specific, cogent reasons for
disregarding [claimant's] testimony. For example, the ALJ stated that she found Bruton's
subjective pain complaints not credible because, *inter alia*: (1) Bruton stated at the

1 the period of her claimed disability, which the ALJ found inconsistent with Plaintiff's
2 allegation that she is unable to work.

3 The ALJ could not reject Plaintiff's subjective complaints based solely on a lack
4 of objective medical support for the alleged severity of the pain. *Rollins*, 261 F.3d at 856.
5 But the ALJ provided clear and convincing reasons for rejecting Plaintiff's subjective
6 testimony by relying on a lack of corroborating medical evidence as well as the additional
7 reasons listed above. Standing alone, perhaps none of the reasons given by the ALJ for
8 rejecting Plaintiff's subjective testimony is sufficient, but, in combination, they meet the
9 clear and convincing standard. The Court therefore affirms the ALJ's credibility
10 determination.

11 **B. Medical Source Opinion**

12 Plaintiff claims the ALJ erred by giving "little weight" to the opinion of Dr. Levine,
13 Plaintiff's treating physician. Dr. Levine opined that Plaintiff could lift and carry less than 10
14 pounds, could stand and/or walk less than two hours, could sit for only two hours, and had to
15 alternate between sitting and standing every 30 minutes. The ALJ found that Plaintiff is less
16 restricted than that assessment.

17 "The ALJ is responsible for resolving conflicts in the medical record." *Carmickle*
18 *v. Comm'r, Soc. Sec. Admin.*, 533 F.3d 1155, 1164 (9th Cir. 2008). Such conflicts may
19 arise between a treating physician's medical opinion and other evidence in the claimant's
20 record. The Ninth Circuit has held that a treating physician's opinion is entitled to
21 "substantial weight." *Bray v. Comm'r, Soc. Sec. Admin.*, 554 F.3d 1219, 1228 (9th Cir.
22 2009)(quoting *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)). A treating
23 physician's opinion is given controlling weight when it is "well-supported by medically
24 accepted clinical and laboratory diagnostic techniques and is not inconsistent with the
25 other substantial evidence in [the claimant's] case record." 20 C.F.R. § 404.1527(d)(2).

26
27 administrative hearing and to at least one of his doctors that he left his job because he
28 was laid off . . .").

1 On the other hand, if a treating physician's opinion "is not well-supported" or "is
2 inconsistent with other substantial evidence in the record," then it should not be given
3 controlling weight. *Orn*, 495 F.3d at 631. Substantial evidence that contradicts a treating
4 physician's opinion may be either (1) an examining physician's opinion or (2) a
5 nonexamining physician's opinion combined with other evidence. *Lester v. Chater*, 81
6 F.3d 821, 830-31 (9th Cir. 1995).

7 If a treating physician's opinion is not contradicted by the opinion of another
8 physician, then the ALJ may discount the treating physician's opinion only for "clear and
9 convincing" reasons. *Carmickle*, 533 F.3d at 1164 (quoting *Lester*, 81 F.3d at 830). If a
10 treating physician's opinion is contradicted by another physician's opinion, then the ALJ
11 may reject the treating physician's opinion if there are "specific and legitimate reasons
12 that are supported by substantial evidence in the record." *Id.* (quoting *Lester*, 81 F.3d at
13 830).

14 Because Dr. Levine's opinion was contradicted, the ALJ had to give specific and
15 legitimate reasons for rejecting his opinion. *Id.* The ALJ offered only the following for
16 giving "little weight" to Dr. Levine's opinion: "Limited weight is given to the opinion . . .
17 of the claimant's treating physician, Dr. Jeffrey Levine, because it is inconsistent with the
18 record as a whole. . . . However, the medical evidence shows that the claimant is less
19 restricted than determined by Dr. Levine." (Doc. 11-4, p. 57.) These brief, general
20 statements regarding the medical record are not sufficiently specific for the Court to
21 determine why the ALJ rejected the opinion of the treating physician. The ALJ therefore
22 failed to give specific and legitimate reasons for rejecting Dr. Levine's medical opinion.

23 **C. Remand for Further Proceedings**

24 Plaintiff requests that the Court remand for an immediate award of benefits. The
25 Commissioner argues that if the Court finds the ALJ erred, the Court should remand for
26 further proceedings, rather than for an award of benefits.

27 The Court always has discretion whether to remand for further proceedings or for
28 payment of benefits. *Harman v. Apfel*, 211 F.3d 1172, 1177 (9th Cir. 2000). "The

1 district court should credit evidence that was rejected during the administrative process
2 and remand for an immediate award of benefits if (1) the ALJ failed to provide legally
3 sufficient reasons for rejecting the evidence; (2) there are no outstanding issues that must
4 be resolved before a determination of disability can be made; and (3) it is clear from the
5 record that the ALJ would be required to find the claimant disabled were such evidence
6 credited.” *Strauss v. Comm’r of Soc. Sec. Admin.*, 635 F.3d 1135, 1138 (9th Cir. 2011)
7 (quoting *Benecke v. Barnhart*, 379 F.3d 587, 590 (9th Cir. 2004)).

8 Because there are conflicting medical opinions regarding Plaintiff’s ability to do
9 work-related activities and because substantial evidence supports the ALJ’s conclusion
10 that the medical record shows that Plaintiff is less restricted than Dr. Levine opined,
11 outstanding issues remain that must be resolved before a determination of benefits can be
12 made. The Court therefore will remand to the Commissioner to hold a new hearing and
13 to make a new determination regarding Plaintiff’s entitlement to disability benefits.

14 Accordingly,

15 **IT IS ORDERED** reversing the Commissioner’s denial of benefits and remanding
16 for further administrative proceedings in accordance with this Order.

17 Dated this 15th day of August, 2012.

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James A. Teilborg
United States District Judge